STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL ROGENSUES,

Plaintiff-Appellee,

v

WELDMATION, INC. and WI LIQUIDATION, INC.,

Defendants,

and

KRAMER INTERNATIONAL, INC.,

Defendant-Appellant.

UNPUBLISHED
February 11, 2014

No. 310389
Macomb Circuit Court
LC No. 2011-005122-CZ

MICHAEL ROGENSUES,

Plaintiff-Appellee,

v

WELDMATION, INC. and WI LIQUIDATION, INC.,

Defendants,

and

KRAMER INTERNATIONAL, INC.,

Defendant-Appellant.

No. 311211
Macomb Circuit Court
LC No. 2011-005122-CZ

Before: M. J. KELLY, P.J., and CAVANAGH and SHAPIRO, JJ.

PER CURIAM.

In Docket No. 310389, defendant, Kramer International, Inc. (defendant), appeals as of right a judgment confirming an arbitration award in favor of plaintiff and against defendant.[1] In Docket No. 311211, defendant appeals as of right an order amending the judgment to include an award of attorney fees, costs, and interest.[2] This Court consolidated the appeals.[3] We reverse in both appeals.

This case arises out of an employment dispute between plaintiff and his former employer, Weldmation, Inc. (Weldmation). Plaintiff was allegedly terminated by Weldmation in August or September 2010. According to the employment agreement plaintiff entered into with Weldmation in 2008, he was allegedly entitled to receive a severance payment upon termination. Plaintiff demanded the severance payment from Weldmation, but did not receive it. On January 7, 2011, pursuant to an arbitration provision in the employment agreement, plaintiff filed a demand for arbitration with the American Arbitration Association (AAA).

On February 7, 2011, defendant entered into an asset purchase agreement (purchase agreement) with Weldmation. The purchase agreement designated the specific assets acquired by defendant from Weldmation and contained the following non-assumption of liabilities provision:

> 4. Liabilities and Obligations.
>
> (a) Non-Assumption of Liabilities. Except as expressly set forth in Section 4(b), Buyer is not assuming, and shall have no responsibility or obligation whatsoever for, any liability or obligation of the Seller including, without limitation, any liabilities or obligations in respect of any accounts payable of Seller.

The purchase agreement also provided that defendant was not retaining any of Weldmation's employees, stating:

> 10. Additional Agreements of the Parties:
>
> * * *
>
> (b) Employees. Effective as of the Closing Date, the employment of the employees of the Business has been terminated. Nothing in this Agreement

[1] Only Kramer International, Inc. filed an answer to plaintiff's complaint; thus, we refer to it as "defendant" in this opinion and we refer to Weldmation, Inc. and WI Liquidation, Inc. as "Weldmation."

[2] Defendant's brief on appeal states that it is not challenging this award on appeal except to the extent that the award must be vacated if the original judgment is vacated.

[3] *Rogensues v Weldmation Inc*, unpublished orders of the Court of Appeals, entered July 19, 2012 and August 22, 2012 (Docket Nos. 310389 & 311211).

> shall obligate Buyer to continue to employ any Seller employee under any circumstances, it being expressly agreed that Seller shall be solely responsible for any amounts due and owing to Seller's employees and, furthermore, Buyer shall be under no obligation to offer employment to any employee of Seller.

The arbitration proceeding initiated by plaintiff proceeded. Plaintiff allegedly sent notice of the arbitration to Weldmation and defendant on July 4, 2011. A management conference was scheduled for August 5, 2011, but only plaintiff appeared. The arbitrator set a dispositive motion and briefing schedule for the parties. On August 9, 2011, the arbitrator sent a certified letter to Earl Kansier[4] of Weldmation which indicated that Kansier, Weldmation, and defendant were parties to the arbitration. The letter informed the parties that the arbitration "may proceed in the absence of any party, who, after due notice, fails to be present or fails to obtain an adjournment." On September 5, 2011, plaintiff submitted his dispositive motion to the arbitrator. The proof of mailing indicated that the motion was mailed to Kansier, Weldmation, and defendant. However, neither Weldmation nor defendant participated in the arbitration.

On November 1, 2011, the arbitrator issued an opinion which stated that plaintiff was entitled to "compensation/damages under the terms of his Employment Agreement." The arbitrator concluded that plaintiff was entitled to receive a severance payment according to the unambiguous terms of the employment agreement; thus, Weldmation was liable to plaintiff. The arbitrator noted that Weldmation failed to establish that it was insolvent, particularly since the purchase agreement entered into with defendant excluded certain cash and assets owned by Weldmation. The arbitrator also noted that the employment agreement stated that it was binding on Weldmation's successors and the purchase agreement stated that defendant was a successor to Weldmation. Accordingly, the arbitrator concluded that defendant was also liable to plaintiff for the severance payment as Weldmation's successor.

On December 5, 2011, plaintiff filed a complaint in the circuit court pursuant to MCR 3.602, seeking confirmation of the arbitration award and requesting a judgment against defendant and Weldmation, as well as attorney fees, costs, and interest. On December 16, 2011, plaintiff filed a motion for confirmation of the arbitration award and requested a judgment against defendant and Weldmation, as well as attorney fees, costs, and interest.

On December 28, 2011, defendant filed its answer and affirmative defenses to plaintiff's complaint. Defendant's affirmative defenses included that the alleged arbitration award was void and unenforceable because (1) defendant never entered into an agreement with plaintiff to submit any dispute to arbitration, and (2) defendant never received notice of a demand for arbitration. Therefore, defendant argued, the arbitration award could not be confirmed by the trial court and a judgment based on the arbitration award could not be entered against defendant.

On January 12, 2012, defendant filed a response to plaintiff's motion for confirmation of the arbitration award and request for a judgment against defendant. First, defendant argued that it "never entered into any arbitration agreement with the Plaintiff nor did [it] agree to be bound

[4] Earl Kansier signed the purchase agreement as the CEO of Weldmation, Inc.

by any contract with Plaintiff that contained an arbitration clause." Defendant argued that it entered into the purchase agreement about five months after Weldmation had terminated plaintiff's employment and, under the terms of the purchase agreement, defendant did not agree to assume plaintiff's employment contract with Weldmation. Relying on *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 98-99; 323 NW2d 1 (1982), defendant argued that the trial court did not have jurisdiction to enter judgment on the arbitration award against defendant because an agreement to arbitrate did not exist between plaintiff and defendant. Further, defendant did not agree in the purchase agreement to assume any of Weldmation's obligations or liabilities associated with plaintiff's employment agreement with Weldmation and defendant did not agree to be subject to the arbitration provision in plaintiff's employment agreement. Moreover, defendant argued, Weldmation never identified plaintiff as a former employee with a potential or existing claim; rather, Weldmation explicitly represented in the purchase agreement that no such outstanding claim existed. Second, defendant argued, it was not bound by the arbitration award because it did not receive due notice of the arbitration in violation of MCL 600.5011. Defendant only learned of the arbitration proceeding about eight months after it had commenced and three weeks before the award was rendered. Accordingly, defendant argued that plaintiff's motion should be denied and its complaint against defendant dismissed.

Following oral arguments, the trial court entered an opinion and order granting plaintiff's motion for confirmation of the arbitration award and request for a judgment against defendant. The trial court rejected defendant's lack of notice argument noting that Kansier, a former employee of Weldmation and current employee of defendant, was sent communications regarding the arbitration proceeding and his signature evidenced his receipt of such communications. Further, the trial court held that MCR 3.602(J) required that a motion to vacate an arbitration award be filed within 91 days after the date of the award and defendant had not filed such motion; thus, "[o]n these grounds, alone, the Court finds Defendants have no basis for relief." With regard to the issue of successor liability, the trial court noted that defendant disagreed with the arbitrator's decision, but the trial court held:

> Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual error or misinterprets the parties' agreement. *Major League Baseball Players Ass'n v Garvey*, 532 US 504, 509; 121 S Ct 1724; 149 L Ed 2d 740 (2001). The fact that an arbitrator's interpretation of the contract is wrong is irrelevant. *Roseville Community School Dist v Roseville Federation of Teachers*, 137 Mich App 118, 123; 357 NW2d 829 (1984). As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision. *United Paperworkers Int'l Union v Misco, Inc*, 484 US 29, 38; 108 S Ct 364; 98 L Ed 2d 286 (1987). The courts . . . have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. *Id*. at 37. By itself, "improvident, even silly, factfinding," is insufficient to justify overturning an arbitration award. *Id*. at 39; see, also, *Major League Baseball Players Ass'n, supra* at 509.

Thus, the trial court confirmed the arbitration award, entered a judgment against defendant and Weldmation, and awarded plaintiff attorney fees and costs associated with bringing this legal action.

On February 28, 2012, defendant filed a motion for reconsideration arguing that the trial court committed palpable error when it concluded that MCR 3.602(J) required defendant to file a motion to vacate the arbitration award to challenge the award. Defendant argued that, as set forth in *Arrow Overall Supply Co*, 414 Mich at 95, the issue of no agreement to arbitrate may be raised as a defense to a complaint and motion to confirm an arbitration award. Further, defendant argued, the trial court committed palpable error when it concluded that it must follow the arbitrator's decision regarding the issue of successor liability because whether a valid agreement to arbitrate exists is an issue for the court to decide, not the arbitrator. See *id*. at 98-99; *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000). Defendant also argued that the trial court committed palpable error when it concluded that defendant had notice of the arbitration on the ground that Kansier received a communication regarding the arbitration. Kansier was the former CEO of Weldmation and, after the execution of the purchase agreement, he provided consulting services to defendant until May 2011. Thus, at the time Kansier signed for one communication on December 14, 2011, he was no longer a consultant or representative of defendant in any capacity. But, in any case, the communication postdated the conclusion of the arbitration proceeding because the arbitration was concluded on November 2, 2011.

On May 4, 2012, the trial court entered an opinion and order denying defendant's motion for reconsideration. On May 31, 2012, the court issued an order granting plaintiff an award of attorney fees and costs. On June 26, 2012, following a stipulation by the parties on the issue of interest, the trial court entered an "order for cash bond" which indicated that the total judgment against defendant was $169,570.70 and that defendant had deposited a cash bond with the court's clerk's office in the amount of $199,000 pending appeal. These appeals followed.

Defendant argues that the trial court erred in confirming the arbitration award and entering a judgment against it because defendant did not enter into an arbitration agreement with plaintiff and was not bound by the employment agreement plaintiff had with Weldmation. We agree.

We review de novo a trial court's decision to enforce, vacate, or modify an arbitration award.[5] *36th Dist Court v AFSCME Council 25, Local 917*, 295 Mich App 502, 508; 815 NW2d 494, rev'd in part on other grounds 493 Mich 879 (2012); *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003). To the extent the trial court considered plaintiff's motion for confirmation of the arbitration award and request for judgment as a motion for summary disposition, we review de novo such decision. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006).

[5] Because the arbitration provision provides that judgment may be entered on the award it is a statutory arbitration. See *Nordlund & Assoc, Inc v Village of Hesperia*, 288 Mich App 222, 226-227; 792 NW2d 59 (2010).

First, defendant argues that it was not required to file a motion to vacate the arbitration award under MCR 3.602(J) in order to affirmatively defend against the confirmation of the arbitration award; accordingly, the trial court erroneously failed to consider defendant's defense that no arbitration agreement existed between plaintiff and defendant before confirming the award. We agree.

MCR 3.602(J)(1) provides that a request for an order to vacate an arbitration award must be made by motion and subsection (3) requires that the motion be filed within 91 days after the date of the award. Here, however, defendant did not request an order to vacate the arbitration award; rather, defendant opposed plaintiff's action seeking confirmation of the arbitration award. It appears that the trial court determined that defendant's failure to timely file a motion to vacate the arbitration award precluded defendant from affirmatively defending against the confirmation of the award by challenging the existence of an arbitration agreement. However, in *Arrow Overall Supply Co* our Supreme Court held that the defense of "no valid agreement to arbitrate" may be raised for the first time in opposition to an action seeking confirmation of an arbitration award. *Arrow Overall Supply Co*, 414 Mich at 98, 101. Specifically, the Court held:

> The defense of "no valid agreement to arbitrate" is a direct attack on the exercise of jurisdiction of both the arbitrator and the circuit court. The decision to submit disputes to arbitration is a consensual one. Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. It follows that a valid agreement must exist for arbitration to be binding. [*Id*. at 98 (quotation marks and citations omitted).]

The Court explained that the existence of a binding arbitration agreement is a condition precedent to the exercise of jurisdiction by the trial court and, whenever the jurisdiction of an arbitrator is questioned, that issue must be decided by the trial court "to make an award on arbitration binding." *Id*. at 98-99. An arbitrator's jurisdiction and authority to resolve a dispute derives solely from the contractual agreement between the parties. *Port Huron Area Sch Dist v Port Huron Ed Ass'n*, 426 Mich 143, 151; 393 NW2d 811 (1986). Further, the subject-matter jurisdiction of a court may be challenged at any time. *McFerren v B & B Investment Group*, 233 Mich App 505, 512; 592 NW2d 782 (1999). Accordingly, to the extent the trial court held that defendant's failure to comply with MCR 3.602(J) precluded defendant from affirmatively defending against the confirmation of the award by challenging the existence of an arbitration agreement, the trial court erred.

Second, defendant argues that the trial court improperly deferred to the arbitrator's conclusion that defendant was bound by the arbitration provision in plaintiff's employment agreement and, thus, erroneously confirmed the arbitration award against defendant. We agree. We review de novo as a question of law the existence and enforceability of an arbitration agreement. *Michelson v Voison*, 254 Mich App 691, 693-694; 658 NW2d 188 (2003).

In response to plaintiff's complaint and motion to confirm the arbitration award, defendant argued that it was not a party to the arbitration agreement and never agreed to arbitrate any disputes with plaintiff. Instead of directly considering defendant's defense before confirming the arbitration award, the trial court held that "[c]ourts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual error

or misinterprets the parties' agreement." However, whether a contract to arbitrate exists and the enforceability of its terms is a matter for the court, not the arbitrator, to decide. *Arrow Overall Supply Co*, 414 Mich at 99; *Huntington Woods v Ajax Paving Indus, Inc (After Remand)*, 196 Mich App 71, 74; 492 NW2d 463 (1992). It is well-established that arbitration is a matter of contract, that '"[a] party cannot be required to arbitrate an issue which he has not agreed to submit to arbitration,"' and that "a party cannot be required to arbitrate when it is not legally or factually a party to the agreement." *St Clair Prosecutor v AFSCME, Local 1518*, 425 Mich 204, 223; 388 NW2d 231 (1986) (citation omitted). In determining whether a contract exists and whether an issue is arbitrable, courts may consider provisions of the parties' agreement. *36th District Court*, 295 Mich App at 516-517. And, here, although the trial court improperly failed to consider the merits of defendant's challenge to the confirmation of the arbitration award, we may do so because the facts necessary for the resolution of this legal issue have been presented. See *id*. at 521; *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 157 n 6; 742 NW2d 409 (2007).

Weldmation entered into an employment agreement with plaintiff in 2008 which provided that either party could terminate the employment agreement. However, it also provided that if Weldmation terminated the employment agreement, plaintiff would be entitled to a severance payment. When plaintiff did not receive the severance payment in the allotted time set forth in the employment agreement, he pursued his claim pursuant to the employment agreement's arbitration clause, which provided:

> 8. Any controversy or claim arising out of or relating to this Agreement or the breach thereof shall be settled by arbitration in the City of Warren, Michigan, in accordance with the rules then obtaining of the American Arbitration Association, and the judgment upon the award may be entered in any court having jurisdiction thereof.

The employment agreement also provided:

> 9. This Employment Agreement shall be binding upon and shall inure to the benefit of the Company and Employee and their respective heirs, representatives, successors and assigns, but neither this Employment Agreement nor any rights hereunder may be assigned by the Employee.

It is undisputed that defendant did not enter into the employment agreement with plaintiff in 2008; thus, defendant was not "factually a party to the agreement." *St Clair Prosecutor*, 425 Mich at 223. Defendant entered into a purchase agreement with Weldmation on February 7, 2011, after plaintiff had been terminated by Weldmation and after plaintiff had filed a demand for arbitration with the AAA. However, plaintiff claimed that defendant was bound by the terms of his employment agreement, including the arbitration provision, because defendant was Weldmation's successor. Plaintiff also argued that defendant was bound under an estoppel theory. Paragraph nine of the employment agreement provided that the agreement was binding on Weldmation's successors. But a corporation that merely purchases the assets of another corporation is not generally responsible for the liabilities of the selling corporation unless there was a voluntary assumption of liability by the purchaser. *Jeffrey v Rapid American Corp*, 448 Mich 178, 189-190; 529 NW2d 644 (1995). There is also legal authority to suggest that

nonsignatories of arbitration agreements can be bound by the agreement pursuant to ordinary contract principles, including incorporation by reference, agency, veil-piercing/alter ego, and estoppel. *AFSCME Council 25 v Wayne Co*, 292 Mich App 68, 81; 811 NW2d 4 (2011), citing *Thomson-CSF, SA v American Arbitration Ass'n*, 64 F3d 773, 776 (CA 2, 1995) and *E I DuPont de Nemours & Co v Rhone Poulenc Fiber & Resin Intermediates, SAS*, 269 F3d 187, 198 (CA 3, 2001).

In this case, the purchase agreement between defendant and Weldmation did not incorporate by reference plaintiff's employment agreement or the arbitration provision in that agreement, and there is no evidence that defendant's conduct suggested that it would assume Weldmation's arbitration obligations with plaintiff or any of Weldmation's former employees. See *AFSCME Council 25*, 292 Mich App at 81-82. To the contrary, the purchase agreement explicitly stated that defendant was "not assuming, and shall have no responsibility or obligation whatsoever for, any liability or obligation of [Weldmation] including, without limitation, any liabilities or obligations in respect of any accounts payable of" Weldmation. The purchase agreement also explicitly stated that "the employment of the employees of [Weldmation] has been terminated" and that "it being expressly agreed that [Weldmation] shall be solely responsible for any amounts due and owing to [Weldmation's] employees." Clearly, defendant did not assume any obligation to Weldmation's employees and expressly disavowed any obligation to Weldmation's employees. See *Starks v Mich Welding Specialists, Inc*, 477 Mich 922; 722 NW2d 888 (2006).

Plaintiff's reliance on *Thomson-CSF, SA*, 64 F3d at 779-780, in support of his estoppel theory is also without merit. That case held that a nonsignatory to an arbitration agreement can bind a signatory to the arbitration agreement under certain circumstances, not the inverse as plaintiff argues in this case. In other words, plaintiff, a signatory, is attempting to bind defendant, a nonsignatory, to the arbitration agreement. As the *Thomson-CSF, SA* Court held, that is not the same issue because arbitration is a matter of contract and the signatory entered into the arbitration agreement. *Id*. at 779. Accordingly, plaintiff's estoppel argument fails.

As defendant argued in the trial court, *STI Prepaid LLC v Pesce*, 85 AD3d 461; 924 NYS2d 390 (2011), is more similar to this case. In that case, the New York Court held that an employer could not be compelled to arbitrate a claim for severance benefits made by an employee pursuant to an employment agreement the employee had entered into with his former employer. Specifically, that Court held:

> The mandatory arbitration provision that respondent seeks to enforce is contained in an employment agreement between respondent and his former employer CVTel Licensing Corporation, to which petitioner is not a signatory. The record reveals that when CVTel entered into an asset purchase agreement with petitioner, it never assigned to petitioner its rights under the employment agreement.
>
> Petitioner did not directly benefit from the information and material that respondent disclosed during his employment with petitioner, which respondent asserts was confidential and protected under his employment agreement with CVTel. Indeed, petitioner already owned the information and material pursuant

> to the asset purchase agreement. At most, it can be said that petitioner received an indirect benefit from respondent's employment agreement in that it "exploit[ed] the contractual relation of parties to [the] agreement, but [did] not exploit (and thereby assume) the agreement itself" (*MAG Portfolio Consultant, GMBH v Merlin Biomed Group LLC*, 268 F3d 58, 61 [{CA 2}, 2001]). Accordingly, Supreme Court properly determined that petitioner is not equitably estopped from denying an obligation to arbitrate. [*STI Prepaid LLC*, 85 AD3d at 461-462.]

Likewise, here, defendant was not a signatory to the employment agreement plaintiff entered into with Weldmation. Plaintiff was no longer employed by Weldmation at the time defendant entered into the purchase agreement with Weldmation, and the purchase agreement specifically stated that none of Weldmation's employees would remain employees of defendant following the closing; thus, defendant did not receive either a direct or indirect benefit from plaintiff or the employment agreement.

For the reasons discussed above, there is no basis to conclude that defendant can be deemed a party to the employment agreement or bound by its arbitration provision under either successor liability or estoppel theories. Accordingly, defendant was not required to arbitrate any dispute plaintiff had with Weldmation. The arbitrator acted contrary to controlling law and, thus, exceeded her authority when she concluded that defendant was bound by plaintiff's employment agreement to arbitrate plaintiff's claim that he was entitled to a severance payment upon termination. See *Washington v Washington*, 283 Mich App 667, 672; 770 NW2d 908 (2009). Therefore, the arbitration award contained an error of law that the trial court could have determined without invading the arbitrator's exclusive province to make factual findings. See *Port Huron Area School Dist*, 426 Mich at 150; *Detroit Auto Inter-Ins Exch v Gavin*, 416 Mich 407, 429; 331 NW2d 418 (1982). The error was "so material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise." *Gavin*, 416 Mich at 443. Thus, the error prevented confirmation of the arbitration award in favor of plaintiff and against defendant. Accordingly, the trial court's order confirming the arbitration award with regard to defendant, only, must be reversed. See *Starks*, 477 Mich at 922. In light of our resolution of this dispositive issue, we need not determine whether defendant received sufficient notice of the arbitration proceeding. Further, because we reverse the underlying order confirming the arbitration award, we also reverse the trial court's order awarding plaintiff attorney fees, costs, and interest.

To summarize, in Docket No. 310389, we reverse the trial court's order confirming the arbitration award and entering judgment in favor of plaintiff and against defendant, only. In Docket No. 311211, we reverse the trial court's order amending the judgment to include an award of attorney fees, costs, and interest.

Reversed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Douglas B. Shapiro